IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 59 OF 2003

Gorakh s/o Dhan Singh
Karki, r/o village Achem,
P.O. Gubrula,
Bajura-Nepal and presently
staying at Calangute, Goa
and presently lodged at
Central Jail at Aguada. ... Appellant

versus

S T A T E ... Respondent

Mr. Arun Bras De Sa, Advocate for the Appellant.

Mrs. Winnie Coutinho, Additional Public Prosecutor for the State/Respondent.

CORAM : P. V. HARDAS, J.

DATE : 5TH MARCH, 2004.

ORAL JUDGMENT

The Appellant by the instant Appeal challenges the conviction passed by the Special Judge,

Narcotic Drugs and Psychotropic Substances Court, Mapusa, by Judgment dated 25th August, 2003, in Special Criminal Case No.2 of 2001, convicting the Appellant for an offence punishable under Section 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentencing him for Rigorous Imprisonment for nine years with default stipulation of Simple Imprisonment for one year in the event of non payment of fine.

2. The facts as are necessary for the decision of this Appeal are set out hereunder:-

On 6th December, 2000, at about 8.10 a.m., P.W.4, P.I. Uday Naik, received specific and reliable information through his sources that one Nepali person, having fair complexion, round face with strong built, aged about 26 years, would be coming at Siolim from Chopdem on the Siolim ferryboat at about 11.00 a.m. to 12.00 noon for delivering consignment of charas to his customers. P.W.4, P.I. Uday Naik, accordingly reduced the said information into writing and handed the same personally to P.W.5, Finton D'Souza, Dy.S.P. The information reduced into writing by P.W.4, P.I. Uday Naik, is at Exh.18 Colly. The information received by P.W.5, Finton D'Souza, Dy.S.P. is at Exh.29. Thereafter, P.W.4, P.I. Uday Naik, instructed a

Constable to secure the presence of two panch witnesses and accordingly, the presence of P.W.3, Francis Fernandes and another panch was secured. The panch witnesses were requested to act as panch and on their expressing their willingness, they were introduced to the members of the raiding party which consisted of P.W.5, Finton D'Souza, Dy.S.P., P.W.6, P.I. Mohan Naik and others. The members of the raiding party thereafter left in separate jeeps towards Siolim. P.W.4, P.I. Uday Naik, carried with him the seal of Anti Narcotic Cell Panaji, Goa-2 with Ashoka Emblem while the Police Constable carried with him the kit box which contained weighing, packing, sealing material etc. On reaching the Siolim ferry wharf at about 10.30 a.m., the raiding party parked their vehicles, alighted from the vehicles and concealed their presence. At about 11.15 a.m. the raiding party espied one person coming from the ferryboat carrying a white colour polythene bag in his right hand. Since the description of the person tallied with the description received earlier, the raiding party surrounded the said person. The person so surrounded has been identified in the trial as the Accused. P.W.4. P.I. Uday Naik, identified himself as the P.S.I. of Anti Narcotic Cell and asked the Accused his name. The Accused disclosed his name. Thereupon, P.W.4. P.I. Uday Naik, apprised the Accused that he had a right to be searched either

in the presence of a Magistrate or a Gazetted Officer. The Accused was also apprised that he had a right to search the members of the raiding party. The Accused, however, declined both the offers. The bag in the possession of the Accused was taken possession of by P.W.4., P.I. Uday Naik and the search of the bag revealed substance in various sizes and shapes, some of which was wrapped in transparent polythene cover. On smelling the substance, P.W.4, P.I. Uday Naik, stated to the raiding party that the said substance was charas. The said substance along with its container was weighed and was found to weigh 967 gms. The said substance was packed and sealed with the seal of Anti Narcotic Cell Panaji, Goa-2 with Ashoka Emblem. The signature of the panch, P.W.4, P.I. Uday Naik and that of the Accused was obtained. Thereafter, the personal search of the Accused yielded Rs.900/- consisting of 9 currency notes of Rs.100/- each which were packed in similar manner.

3. On returning to the Police Station, P.W.4, P.I. Uday Naik, lodged his complaint at Exh.19 and sent the information under Section 57 at Exh.29 to P.W.5, Finton D'Souza, Dy.S.P. The information under Section 57 of the Narcotic Drugs and Psychotropic Substances Act, 1985 received by P.W.5, Finton D'Souza, Dy.S.P. is at Exh.30. Thereafter, P.W.4, P.I. Uday

Naik, handed over the seized muddemal, the letters addressed to the Analyser and seal to P.W.6, P.I. Mohan Naik, vide letter at Exh.20. P.W.6, P.I. Mohan Naik, entered the muddemal in the muddemal register. Thereafter, on the next day, the property was sent for analysis and it was received by P.W.2, Krishna Shetgaonkar, who acknowledged the receipt of the muddemal on the covering letter at Exh.9. He kept the property in safe custody and thereafter transmitted the same to P.W.1, Mahesh Kaissare, who analysed the said substance and by his report at Exh.7 opined that the seized substance was charas.

4. Further to the completion of the investigation, a charge-sheet against the Appellant came to be filed. The learned Trial Judge, vide Exh.3 framed a Charge against the Appellant. The Appellant denied his guilt and claimed to be tried. The prosecution in support of its case examined six witnesses. The learned Trial Judge on appreciation of the evidence recorded a finding of the guilt of the Accused and convicted and sentenced him as aforestated.

5. Mr. Arun Bras De Sa, learned Counsel appearing on behalf of the Appellant/Accused has submitted (a) that the evidence of the prosecution regarding the scribing of the panchanama at the scene

of offence is rendered doubtful in view of the manner in which the panchanama was scribed. (b) The discrepant evidence regarding the fact whether all the pieces of charas were individually wrapped in polythene papers or some of them were wrapped in cellophane paper rendered the scribing of the panchanama and the arrest of the Accused at the scene doubtful. (c) There was no evidence that the seal had been handed back to the Officer incharge of the Police Station and thus tampering could not be ruled out. (d) In view of the various discrepancies in the prosecution case, the defence of the Accused that he had not been arrested at the spot but had been brought to the Police Station and the seizure of the drugs foisted on him cannot be ruled out.

6. Mrs. Winnie Coutinho, learned Additional Public Prosecutor appearing on behalf of the State/Respondent has supported the Judgment and has urged that there are no discrepancies to jettison the prosecution case.

7. In order to appreciate the rival submission, it would be useful to make a reference to the evidence of P.W.4, P.I. Uday Naik. P.W.4, P.I. Uday Naik, after referring to the receipt of the information, the introduction of the panchas, proceeding for the raid

and the seizure of the narcotic drug, states that on returning to the Police Station, he lodged his complaint at Exh.19. Perusal of the letter at Exh.20 shows that apart from the seized narcotic drugs, Rs.900/-, letter addressed to the Authorities for analysis of the drug and a seal of the Anti Narcotic Cell Panaji, Goa-2 with Ashoka Emblem was handed over for safe custody. In the cross-examination, he has admitted that P.W.3, Francis Fernandes, the panch witness was his neighbour now but was not his neighbour at the time of raid. P.W.4, P.I. Uday Naik, has further admitted that he could not recall if P.W.3, Francis Fernandes, was a witness in any earlier case investigated by him. He had further stated that P.W.3, Francis Fernandes, was not a witness in any single case investigated by him when he was attached to the Traffic Cell at Mapusa. He has further stated that he had not shown the written information to the witnesses but had originally told him about the receipt of the said information. He has further admitted in the cross-examination that he had introduced the panch to P.W.5, Finton D'Souza, Dy.S.P. in the Anti Narcotic Cell Police Station Office. Further explanation was brought out in the cross-examination that the panchas were sitting in the cabin of P.W.4, P.I. Uday Naik, where P.W.5, Finton D'Souza, Dy.S.P. was sitting and which must have led the panch witnesses to believe that

it was the Office of P.W.5, Finton D'Souza, Dy.S.P. He has also admitted that the Office of P.W.5, Finton D'Souza, Dy.S.P. is located at a distance of 100 meters from the Office of the Anti Narcotic Cell Police Station Office. He was asked in the cross-examination to reproduce the said words in Hindi. He had further admitted that in response to the appraisal of the right under Section 50 the Accused had replied "Nahi Chahiye" (not necessary). It was further admitted in the cross-examination that he had used the support of the kit box to write the contents of the panchanama. He was sitting on the road while writing the panchanama. There is no cross-examination to his statement and the seal had been deposited with P.W.6, Mohan Naik, P.I.

8. P.W.3, Francis Fernandes, after referring to he being summoned to the Anti Narcotic Cell Police Station Office states that on his agreeing to act as a panch witness, P.W.4, P.I. Uday Naik, disclosed to him about the receipt of the specific and reliable information. He further states that P.W.4, P.I. Uday Naik, disclosed to them that he had reduced the said information into writing and a copy had been handed over to P.W.5, Finton D'Souza, Dy.S.P. Thereafter, they proceeded for raid. A kit box containing weighing, sealing material etc. was also carried. When they reached near the wharf at about 10.30 a.m.,

they parked their vehicles on the left side and remained by the side of the Bar known as Bar Kalangutkar. At about 11.15 a.m., they noticed a person alighting from a ferry and immediately the raiding party surrounded the said person. P.W.4, P.I. Uday Naik, introduced himself and informed the said person about the receipt of the reliable information. P.W.3, Francis Fernandes, has also identified the Accused as the said person who was accosted by the members of the raiding party. The Accused was asked his name which was disclosed as Kharki. P.W.4, P.I. Uday Naik, then introduced the members of the raiding party to the Accused and apprised him of his right of being searched either before a Magistrate or a Gazetted Officer and the Accused replied saying "nahi". P.W.4, P.I. Uday Naik, then took the bag from the hand of the Accused and on opening it P.W.4, P.I. Uday Naik, then disclosed to the raiding party that the said substance was charas and the substance was weighed and found to be 900 gms. The substance was in round elongated and flat shaped and blackish in colour. The elongated sticks were partly covered in transparent polythene as also some of the round and flat shaped pieces. The said substance was sealed and the envelope was signed by him and the other panch, P.W.4, P.I. Uday Naik and the Accused. The personal search of the Accused yielded Rs.900/- consisting of 9 currency notes of

Rs.100/- each. Since the Accused had no valid document he was placed under arrest. The panchanama of the entire sequence of event was prepared and the same is at Exh.13. The Seizure Report is at Exh.14. He has admitted that the conversation between the Accused and P.W.4, P.I. Uday Naik, was in Hindi.

9. In the cross-examination, he has stated that he personally does not know P.W.4, P.I. Uday Naik. He has further admitted in the cross-examination that there was one person in the cabin of P.W.4, P.I. Uday Naik and thereafter, P.W.4, P.I. Uday Naik had taken him and the other person to P.W.5, Finton D'Souza, Dy.S.P. There were several Police Officers in the cabin of P.W.5, Finton D'Souza, Dy.S.P. He has also admitted that P.W.4, P.I. Uday Naik, was squatting down and stood up to ask questions. He has also admitted in the cross-examination that he was unable to state the exact number of substances which were either round, elongated or flat in shape since all these were not removed from the bag(emphasis supplied). He has further admitted that he was unable to state how many of the substances in the bag were not covered with cellophane papers. He was unable to reproduce the exact words in Hindi used by P.W.4, P.I. Uday Naik while apprising the Accused of his right under Section 50. He had denied the suggestion that he was unable to

state the same for the reason that he was not present at the spot. He also denied the suggestion that he was acting as a panch witness at the instance of P.W.4, P.I. Uday Naik.

10. P.W.5, Finton D'Souza, Dy.S.P. states about the receipt of the information from P.W.4, P.I. Uday Naik thereafter proceeding for raid and about the accosting of the Accused by the raiding party. He further states about appraisal of the right to the Accused regarding the search either before a Magistrate or a Gazetted Officer and the search of the members of the raiding party. He further states about finding of the narcotic drugs in the bag and the seizure of Rs.900/-. In respect of the seizure of the drugs in his examination-in-chief, he states that the search of the white polythene bag yielded black colour substance in different sizes and shapes wrapped individually in cellophane papers. In the cross-examination, he has admitted that P.W.4, P.I. Uday Naik, had introduced the panchas to him in the Office of P.S.I. Naik where he had gone upon the information being handed over by P.S.I. Naik. He has further stated in the cross-examination that the panchanama was written by taking the support of the jeep.

11. P.W.6, Mohan Naik, also states about the

sending of the information to P.W.5, Finton D'Souza, Dy.S.P. by P.I. Naik and the introduction of the panchas and thereafter proceeding for raid. He further speaks about the Accused being accosted by the members of the raiding party and he declining to be searched of his appraisal of right under Section 50. He then states that during the search of the polythene bag, cylindrical rods black in shape were found in the polythene bag. He further states that as per the letter Exh.20, he made a record of the receipt of the muddemal in the station diary entry no.36. He further states that the property was forwarded for onward transmission to the Analyser. In the cross-examination, it is admitted that P.W.6, P.I. Mohan Naik, used the kit box as a support to write the panchanama. It is further stated that he does not know whether any document was prepared by using a typewriter.

12. On the basis of the evidence of P.W.5, Finton D'Souza, Dy.S.P, the learned Counsel appearing on behalf of the Appellant submitted that in view of the discrepancy in the evidence regarding the manner in which the panchanama was scribed, an inference that the panchanama was not scribed at the place where the Accused was arrested can be drawn. It is true that P.W.3, Francis Fernandes, states that the panchanama

was written by P.W.4, P.I. Uday Naik, by squatting on the ground while P.W.4, P.I. Uday Naik, states that he had scribed the panchanama by sitting on the ground and using the kit box for support. It is equally true that P.W.5, Finton D'Souza, Dy.S.P. states that the panchanama was scribed by taking the support of the jeep while P.W.6, P.I. Mohan Naik, states that the panchanama was scribed by taking the support of the kit box. There is no material discrepancy in the evidence of either P.W.3, Francis Fernandes, P.W.4, P.I. Uday Naik and P.W.6, P.I. Mohan Naik so as to cast a doubt regarding the claim of the prosecution that the panchanama was scribed at the spot. Both, P.W.3, Francis Fernandes and P.W.4, P.I. Uday Naik, have stated that the panchanama was scribed by P.W.4, P.I. Uday Naik, by sitting on the ground. P.W.4, P.I. Uday Naik, states that he had used the kit box as a support and the same is reiterated by P.W.6, P.I. Mohan Naik. The panchanama was, therefore, as per the prosecution case scribed by P.W.4, P.I. Uday Naik by either sitting/squatting on the ground and using the kit box as a support. While appreciating minor discrepancies in the evidence of witnesses, the evidence of the witnesses should not be viewed with a microscope to find out if each and minor detail is corroborated inter se by them. The evidence substantively avers that the panchanama was scribed at the spot. It is true that

P.W.5, Finton D'Souza, Dy.S.P. has stated that the support of the jeep was used for scribing the panchanama. This statement of P.W.5, Finton D'Souza, Dy.S.P. is obviously an incorrect statement which he is making after the lapse of considerable time. This statement can be attributed to the aberration of memory and on that basis alone the evidence of prosecution cannot be viewed with suspicion.

13. It was then urged by Mr. Arun Bras De Sa, learned Counsel for the Appellant that there was no satisfactory evidence regarding the appraisal of the right to the Accused under Section 50. According to him, firstly, the Accused was informed in Hindi and the exact words used by P.W.4, P.I. Uday Naik are not reflected in the panchanama at Exh.30. Secondly, it is urged that the answer given by the Accused is differently stated by different witnesses. P.W.3, Francis Fernandes, has only stated that the Accused had said no while P.W.4, P.I. Uday Naik and P.W.5, Finton D'Souza, Dy. S.P. had stated as not necessary and P.W.6, P.I. Mohan Naik, had stated differently. In view of this, it is urged that there has been a total non compliance of Section 50. In the panchanama at Exh.13, it is stated that the Accused was apprised of his right and he had declined to exercise that right. The words used in Hindi are not incorporated in the

panchanama. The witnesses were asked to reproduce the exact words used by P.W.4, P.I. Uday Naik in their cross-examination. The witnesses have reproduced the words as also the words used by the Accused in declining to exercise their right. Failure on the part of the witnesses to reproduce the exact words or a slight discrepancy in the ability of the witnesses to recapitulate and state the exact words used by the Accused in refusing to exercise their right, according to me, cannot be fatal to the prosecution case. Similarly, the discrepancy in respect of some of the pieces of charas being individually wrapped in polythene and P.W.6, P.I. Mohan Naik, not deposing to the said fact while P.W.5, Finton D'Souza, Dy.S.P. deposing about the pieces being individually wrapped in cellophane papers would not materially affect the prosecution case. P.W.3, Francis Fernandes and P.W.4, P.I. Uday Naik, have clearly stated about some pieces being wrapped in cellophane papers. P.W.5, Finton D'Souza, Dy.S.P. and P.W.6, P.I. Mohan Naik, though had accompanied the raiding party were not directly interested in the raid as such as being superiors of P.W.4, P.I. Uday Naik, they accompanied the raiding party. Moreover, they were deposing after nearly about three years of the raid and in such circumstances, slight discrepancy would not affect the veracity of the prosecution case. Minor discrepancies which do not

affect or touch the core of the prosecution case are not sufficient for doubting the prosecution case.

14. It is submitted that P.W.6, P.I. Mohan Naik, does not state that the seal had been deposited by P.W.4, P.I. Uday Naik. P.W.4, P.I. Uday Naik, in his examination-in-chief had stated regarding the deposit of the seal. This statement of fact of P.W.4, P.I. Uday Naik, was corroborated by the letter at Exh.20 which refers to the deposit of seal with P.W.6, P.I. Mohan Naik. The learned Prosecutor while conducting the trial unfortunately solicited no information from P.W.6 ,P.I. Mohan Naik, regarding the deposit of seal. However, P.W.6, P.I. Mohan Naik, in his evidence acknowledges to have received the letter at Exh.20. He further states that he had made a record of the receipt of the muddemal in the station diary vide Exh.36. There is nothing in the cross-examination of P.W.4, P.I. Uday Naik, to render his statement that he had deposited the seal as either doubtful or false. Therefore, in the peculiar circumstances of the case, according to me, mere non mention of the receipt of the seal by P.W.6, P.I. Mohan Naik, from P.W.4, P.I. Uday Naik, would not render the statement of P.W.4, P.I. Uday Naik as doubtful. It is undoubtedly true that the prosecution must by evidence establish that the seal has been deposited with the Station House Officer and

was not in possession of the Raiding Officer. This is imperative in order to obviate an inference that the parcel had been tampered with. In the present case as held by me, P.W.4, P.I. Uday Naik, in his evidence had stated that the seal had been deposited by him and there is nothing on record to hold his statement to be either false or doubtful.

15. Alternatively, it is urged by Mr. Arun Bras De Sa, learned Counsel appearing on behalf of the Appellant that though, the offence under Section 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act,1985, is punishable with a maximum sentence of ten years and fine of Rs.1,00,000/-, the Appellant who has undergone three and half years of imprisonment be released on the period of imprisonment already undergone. According to the learned Counsel appearing on behalf of the Appellant, the Appellant is a young person who was aged 28 years at the trial and there are no bad antecedents to his discredit. It is also urged that the Appellant is a native of Nepal.

16. Admittedly, the Accused was found in possession of the quantity which was more than the small quantity but lesser than the commercial quantity. The maximum sentence for a person found in possession of quantity more than the small quantity but lesser

than the commercial quantity is Rigorous Imprisonment for a term of ten years. In the present case, the Appellant has been sentenced to undergo Rigorous Imprisonment for nine years. It is equally true that an offence under the Narcotic Drugs and Psychotropic Substances Act are serious offences as these "Merchant of Death" inflicts not only pain and suffering on individual victims but also cause pain to the Society at large. Unsuspected victims are lured in the habit of taking drugs which ultimately leads to pain and suffering. It is equally true that the Appellant is aged 28 years and since there are no bad antecedents to his discredit, according to me, a sentence of seven years Rigorous Imprisonment would meet the ends of justice. The sentence in the event of non payment of fine, however, is maintained and remains unaltered.

17. In the result, therefore, Criminal Appeal No.59 of 2003 is partly allowed. The sentence of nine years Rigorous Imprisonment is substituted by a sentence of seven years Rigorous Imprisonment while maintaining the sentence of payment of fine of Rs.75,000/- and the default sentence of one year imprisonment.

18. Criminal Appeal No.59 of 2003 is thus partly allowed.

19. Since the Appellant is in Jail, copy of the Judgment be sent to the Appellant in Jail.

P. V. HARDAS, J.

RD.